SUPREME COURT, U. S.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 932

PERCY HENRY,

Appellant,

versus

STATE OF LOUISIANA,

Appellee.

On Appeal from the Supreme Court of Louisiana

JURISDICTIONAL STATEMENT.

THOMAS BARR III
Suite 636
National Bank of
Commerce Building
New Orleans, Louisiana
70112

CARMOUCHE & SHELTON
EMILE A. CARMOUCHE
THOMAS ROBERT SHELTON
114 East 5th Street
Crowley, Louisiana
70526

Attorneys for Appellant

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On Appeal from the Supreme Court of Louisiana.

JURISDICTIONAL STATEMENT

Appellant submits this statement to show that the instant appeal is within the Court's jurisdiction, in that the validity of the Louisiana statutory provision,

defining and fixing penalties for the crime of obscenity, were brought in question in the State Supreme Court on the ground of its being repugnant to the First and Fourteenth Amendments to the Constitution of the United States, and the decision of the State Court is in favor of its validity.

In connection with the above, may we invite this Court's attention to the fact, and submit with respectful emphasis, that the main constitutional issues involved herein have been resolved by this Court in the following cases: *Keney v. New York, October Term, 1966, No. 2; Redrup v. New York, October Term, 1966, No. 3, S. Ct. 1414; Austin v. Kentucky, October Term, 1966, No. 16, 87 S. Ct. 1414; Gent v. Arkansas, October Term, 1966, No. 50, 87 S. Ct. 1414; Aday v. United States, October Term 1966, No. 149; Quantity of Books v. Kansas, October Term, 1966, No. 865; Corinth Publications, Inc. v. Westberry, October Term, 1966; Conner v. City of Hammond, October Term, 1967, No. 259.*

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana is reported in Volume 198, So. 2d, at page 889. The opinion of the Sixteenth Judicial District Court for the Parish

of Iberia, the court of first instance, has not been reported. Both opinions are printed in the Appendices, at pages · and · , respectively, infra.

JURISDICTION

This is a criminal prosecution for obscenity, brought against appellant pursuant to Section 106 of Title 14 of the Louisiana Revised Statutes.

The judgment of the Supreme Court of Louisiana was rendered on May 1, 1967. Rehearing was denied, and the judgment became final and executory, on June 5, 1967.

This Court has jurisdiction of the appeal under 28 USC 1257 (2). Chaplinsky v. New Hampshire, 315 US 568 (1942); DeJonge v. Oregon, 299 US 353 (1937); Dahnke-Walker Co. v. Bondurant, 257 US 282 (1921). Should this appeal be held not to fall within this Court's jurisdiction under 28 USC 1257 (2), this Court has certiorari jurisdiction under 28 USC 1257 (3) and 28 USC 2103.

STATUTES INVOLVED

The appeal involves the validity, under, the First, Sixth and Fourteenth Amendments to the Constitution of the United States (relating to freedom of speech and of

the press, trial by jury, due process of law, and the right of equal protection of the laws), of Section 106 of Title 14, and Section 340 of Title 15 of the Louisiana Revised Statutes.

Section 106 of Title 14 of the Louisiana Revised Statutes, insofar as is pertinent to this appeal reads as follows:

"A. Obscenity is the intentional: * * * (2)Production, sale, exhibition, gift, or advertisement with the intent to primarily appeal to the prurient interest of the average person, of any lewd, lascivious, filthy or sexually indecent written composition, printed composition, book, magazine, pamphlet, newspaper, story paper, writing, phonograph record, picture drawing, motion picture film, figure, image, wire or tape recording or any written, printed, or recorded matter of sexually indecent character which may or may not require mechanical or other means to be transmitted into auditory, visual or sensory representations of such sexually indecent character.

(3) Possession with the intent to sell, exhibit, give or advertise any of the pornographic material of the character as described in paragraph 2 above, with the intent to primarily appeal to the prurient

interest of the average person. * * * *

"C. Whoever commits the crime of obscenity shall be fined not less than one hundred dollars nor more than five hundred dollars, or imprisoned for not more than one year, or both."

Section 340 of Title 15 of the Louisiana Revised Statutes provides that "every misdemeanor shall be triable by the Judge without the intervention of a jury."

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether Section 106 of Title 14 of the Louisiana Revised Statutes violates the 1st and 14th Amendments of the United States Constitution relating to freedom of speech and of the press, due process of law and the equal protection of the laws?

2. Whether Section 106 of Title 14 of the Louisiana Revised Statutes is unconstitutional on the grounds that the material and acts, denounced therein, are not defined and/or required, by the terms of the statute, to be such as would constitute obscenity under the tests for obscenity as set forth in the pertinent and controlling jurisprudence established by the Supreme Court of the

United States, particularly though not exclusively, inasmuch as said *material and acts* are not required, by said statute, to be utterly without redeeming social importance or artistic value; are not required to be such as to go substantially beyond the customary limits of candor; are not required to be such, the dominant theme of which, as a whole, would primarily appeal to the prurient interest of the average person in the community as judged by community standards?

The Supreme Court of the State of Louisiana decided in favor of the validity of said statute.

3. Whether appellant was deprived of his constitutional rights, guaranteed by the 1st and 14th Amendments of the United States Constitution, when the allegedly obscene material was evaluated and determined to be obscene by the *court a quo*, and the Louisiana Supreme Court, according to standards at variance with those established by The Supreme Court of the United States; i.e., when the obscenity of said material was evaluated and determined according to purely local, rather than on a national, basis or standard — the provisions and guaranties of the National Constitution being involved and at issue.

The Supreme Court of the State of Louisiana decided in favor of the utilization of a purely local rather than a

national standard.

4. Whether the magazines, which are the basis of subject prosecution, are constitutionally protected material; and, whether the denial of the possession and sale of the same violates the 1st and 14th Amendments of the Constitution of the United States?

The Supreme Court of the State of Louisiana decided that said magazines were not entitled to the protection of the 1st and 14th Amendments of the Constitution of the United States.

5. Whether the denial of a trial by jury is violative of the 6th Amendment of the United States Constitution, in a case such as is this which involves national constitutionally guaranteed rights of freedom of speech and of the press.

The Supreme Court of the State of Louisiana decided that the denial of a jury trial in such a case was not an abridgment of appellant's said constitutional rights.

6. Whether the Bill of Information which is the basis of subject prosecution, is null and void, and insufficient, in that it does not meet the requirements of the 6th and 14th Amendments of the United States Constitution, and Section 9 of Article I of the Louisiana

constitution, which — being mandatory constitutional provisions — require that a Bill of Information and/or Indictment allege all of the facts and elements which are necessary to clearly inform the accused of the nature and cause of the accusation against him?

The Supreme Court of the State of Louisiana decided in favor of the validity of subject Bill of Information.

STATEMENT OF THE CASE

Percy Henry, the appellant herein, was the operator of a business establishment in the City of New Iberia, Louisiana, dealing generally with groceries and the sale of all sorts of magazines, current and popular, newspapers, etc. He was charged, under a Bill of Information, with having violated Paragraphs (2) and (3), Section 106, of Title 14 of the Louisiana Revised Statutes of having possessed and sold *certain* allegedly obscene material in violation of the provisions of paragraphs (2) and (3), Section 106 of Title 14 of the Louisiana Revised Statutes. He was duly arraigned, tried, convicted, and sentenced. On appeal, the Louisiana Supreme Court affirmed the conviction and sentence.

The Bill of Information under which appellant was prosecuted simply alleged, in substance, that the defendant, on or about a given date, did unlawfully sell

and/or possess "*certain* lewd, lascivious, filthy and sexually indecent printed compositions, books, magazines * * * with the intent to primarily appeal to the prurient interest of the average person, in violation of La. R. S. 14:106; Obscenity * * *."

The specific allegedly obscene material which appellant was accused with having possessed and sold were eleven (11) magazines. These magazines were enumerated by the District Attorney in compliance with an application for a Bill of Particulars, and were duly filed in evidence. These magazines are: GENT, CAPER, SIR, ROGUE, JAGUR, GEM, NUGGET, CARNIVAL, WILDCAT, ACE and SIR YEAR BOOK.

THE QUESTIONS ARE SUBSTANTIAL AND IMPORTANT

The federal questions raised in this case present constitutional issues which are significantly important not only as a matter of law but also as a matter of public policy.

These issues, in the main, are:

(1) Whether the publications involved in this case are entitled to and should be afforded the protection

of the First and Fourteenth Amendments to the Constitution of the United States. Three (3) of these publications, the paper-back magazines titled GENT, SIR, and ACE, respectively, are issues of publications, bearing the same names, of which certain similar issues were declared by this Honorable Court, the Supreme Court of the United States, to be protected by the aforesaid First and Fourteenth Amendments, in *Gent v. Arkansas, October term, 1966, No. 50, 87 S.Ct. 1414.*

In *Austin v. Kentucky, October Term, 1966, No. 16, 87 S. Ct. 1414,* this Honorable Court, the Supreme Court of the United States, found that the magazine "SPREE" was not obscene, and that it was entitled to the constitutional protection afforded and guaranteed by the First and Fourteenth Amendments. A very casual inspection of the magazine "SPREE" will disclose, we respectfully submit, that its substance and contents are at least apparently, if not obviously, far more objectionable than are any of the publications which are involved in this case.

The subject matters, articles and pictures of the aforementioned publications (which *were* at issue before this Honorable Court, The Supreme Court of the United States, *in Redrup v. New York, October term, 1966, No. 3, 87 S. Ct. 1414; Gent v. Arkansas,*

October term, 1966, No. 50, 87, S. Ct. 1414; Austin v. Kentucky, October term, 1966, No. 16, 87 S. Ct. 1414; Oday v. United States, October term, 1966, No. 149; Quantity of Books v. Kansas, October term, 1966, No. 865; Corinth Publications, Inc. v. Westberry, October terms, 1966, No. 277; and Conner v. City of Hammond, October term, 1967, No. 259;) deal, in the main, with the subject of sex. The pictures generally portray side or back views of young females totally unclad, or front views of the girls unclad from the waist up. A number of the stories or articles deal with adultry or fornication, the number varying in the several magazines. It is respectfully submitted that all of the aforesaid publications which were considered by this Honorable Court, in the cases hereinabove cited, can correctly be described and classified as so-called "girlie magazines," all of which are identical in substance and legally indistinguishable one from the other.

Appellant herein, most respectfully, submits that it is impossible (from any view point or theory, legal, moral or otherwise) to legally distinguish the allegedly obscene publications *in the case at bar* from the publications involved in the *Redrup v. New York, et al., cases, supra*, which this Honorable, The Supreme Court of the United States, has declared to be protected by the First and Fourteenth Amendments, and not

subject to governmental suppression, whether criminal or civil, in personam or in rem.

(2) Whether the Louisiana Supreme Court, in this case, was justified, and correct, in ignoring and not respecting the findings and pronouncements of this Honorable Court, The Supreme Court of the United States, as set forth and emphasized in *Redrup v. New York, Austin v. Kentucky and Gent v. Arkansas, Supra* — especially when the aforesaid decisions of this Honorable Court were specifically brought to the attention of the Louisiana Supreme Court in this case.

(3) Whether, in the light of, and in view of, the decisions of this Honorable Court in *Conner v. City of Hammond, No. 259, Decided October 23, 1967* (a Louisiana case) the decision of the Louisiana Supreme Court in the case at bar can be sustained.

The First and Fourteenth amendments of the national constitution, we submit, apply with equal force and protection to all of our citizens wheresoever they may abide in this nations — and, the *identical material* which is specifically held by this Honorable Court, The Supreme Court of the United States, to be entitled to the protection of said amendments in one and/or several states, or in a section of one state, cannot be

correctly held to be beyond such constitutional protection in any other state, or in a different section of one state. It is also submitted that in the interest of impartial justice and for the purpose of avoiding, if possible, any unjustifiable conflict of judicial decrees, which might well result in discrimination between the citizens of one section of Louisiana and another section of the same state, as well as a descrimination between the citizens of Louisiana and the citizens of other states, concerning the sale and publication of *identical material* — the decision of the Louisiana Supreme Court in this case should be reserved.

(4) Whether a defendant in a First and Fourteenth Amendment case may legally be deprived of a trial by jury even though the offense denounced by the State Statute, under which the prosecution is based, classifies the acts prohibited thereby as a misdemeanors?

In Louisiana a trial by jury is not allowed in so-called misdemeanor cases. *LSA - R.S. 15:340* specifically provides that "every misdemeanor shall be triable by the judge without the intervention of a jury." The offense denounced in the case at bar is, under *LSA - R.S. 14:106*, a misdemeanor by virtue of the provisions of the *LSA - R.S. 14:2, paragraphs 4 and 6, respectively*.

In *Quantity of Copies of Books v. Kansas*,

84 S. Ct. 1723, this Honorable Court recognized that the right to trial by jury in a First Amendment case in a substantial question. In *Kingsley Books v. Brown, 77 Ct. 1325* Mr. Justice Brennan, in a dissenting opinion, observed "I believe the absence in this New York obscenity statute of a right to a jury trial is a fatal defect * * *." *In Gideonv. Wainwright, 83 S.Ct. 792* this Honorable Court emphasized that a provision of the *Bill of Rights* which is "fundamental and essential to a fair trial" is made obligatory upon the States by the *Fourteenth Amendment.* The *Sixth Amendment* provides for the right to trial by jury.

(5) Whether the Bill of Information, forming the basis of subject prosecution, is null and void in that it does not meet the statutory and constitutional requirements which make it mandatory that an accused be informed of the nature and cause of the accusation against him. The Bill of Information in this case merely alleged that the accused sold and/or possessed "*certain*" lewd, lascivious, etc. books and magazines etc., without designating and/or naming the specific books and magazines complained of. *Sections 2, 9 and 10 of Article I of the Louisiana Constitution and the Sixth and Fourteenth Amendments of the Constitution of the United States.*

CONCLUSION

Appellant respectfully submits that the publications in this case are protected by the First and Fourteenth Amendments to the Constitution of the United States from governmental (State or Federal) suppression, whether criminal or civil, in personam or in rem; and, that, by virtue of the authority of the decisions of this Honorable Court, which have been cited herein, the judgment of the Louisiana Supreme Court, which is the bases of subject appeal, should be reversed.

RESPECTFULLY SUMBITTED,

THOMAS BARR III
Suite 636
National Bank of
Commerce Building
New Orleans,
Louisiana 70112

CARMOUCHE & SHELTON
EMILE A. CARMOUCHE
THOMAS ROBERT SHELTON
114 East 5th Street
Crowley,
Louisiana 70526

ATTORNEYS FOR APPELLANT